No. 87-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES L. SCHLEIGH, *et al.*,
Petitioners,

v.

ESTHER V. REIGH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988, authorize the award of fees against a State found not to have violated federal law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

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INTEREST OF AMICI CURIAE

Amici are States within the geographical jurisdiction of the United States Court of Appeals for the Fourth Circuit.[1] Amici are frequent litigants in the federal courts

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[1] Because this brief is filed on behalf of States, by their respective attorneys general, consent to its filing is not required. See Sup. Ct. R. 36.4.

within the Fourth Circuit in actions in which they are subject to claims under the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988. Thus, amici have an acute interest in and are affected directly by the "prevailing party" standard applied in the Fourth Circuit.

Since the decision in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), cert. denied, 455 U.S. 961 (1982), the rule in the Fourth Circuit has been that a plaintiff is a "prevailing party" entitled to attorney's fees under the Attorney's Fees Act if the plaintiff's lawsuit caused the defendant to change his conduct, even if that change is not required as a matter of law. Amici contend that this standard is inconsistent with both the intent of the Attorney's Fees Act and with States' Eleventh Amendment immunity in federal court. Because the Fourth Circuit's rule results in amici paying attorney's fees even in cases where state

law, practice, or policy do not violate federal law, amici respectfully request this Court to grant the petition and review the decision in this case.

STATEMENT OF THE CASE

Plaintiffs challenged the constitutionality of Maryland's post-judgment attachment rules. While the district court declared those rules unconstitutional, Reigh v. Schleigh, 595 Supp. 1535 (D.Md. 1984), the Fourth Circuit upheld the rules and reversed the district court, 784 F.2d 1191 (1986), and this Court denied certiorari, 107 S.Ct. 167 (1986) ("Reigh I"). Notwithstanding the fact that Maryland prevailed in Reigh I, the district court then ordered the State to pay plaintiffs' attorneys' fees, and the Fourth Circuit affirmed that fee award. Reigh v. Schleigh, 829 F.2d 1234 (1987) ("Reigh II"). The petition seeks review of the propriety of the award of attorneys' fees

against the State in a case that the State won.

REASONS FOR GRANTING REVIEW

I. The "Prevailing Party" Standard Applied In the Fourth Circuit Is In Conflict With The Standard Applied In Other Circuits.

The Fourth Circuit applies a different and substantially more expansive prevailing party standard than that applied in other federal circuits. This fact was noted by Chief Justice Rehnquist, joined by Justice O'Connor, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982), and has been noted in opinions of the Fourth Circuit and of district courts within that circuit.[2]

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[2] See Young v. Kenley, 614 F.2d 373 (4th Cir. 1979) (reversing denial of attorney's fees, the district court having based its decision on Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), and remanding for reconsideration in light of Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979)); ECOS, Inc. v. Brinegar, 671 F.Supp. 381, 390 n.3 (M.D.N.C. 1987) ("Other circuits approach this [previaling party] con't

This sharp conflict in the circuits on an important question of federal law is reason enough for this Court to grant the petition. See Sup. Ct. R. 17.1(a). Here, the need for review is particularly great. As this case graphically illustrates, the Fourth Circuit interprets the prevailing party standard so broadly as to permit the award of attorneys' fees to plaintiffs who sued the State and lost.

II. The Fourth Circuit's Decision Is Inconsistent With Both The Intent Of The Attorney's Fees Act And With State's Eleventh Amendment Immunity In Federal Court.

In City of Riverside v. Rivera, 106 S.Ct. 2686, 2695-98 (1986), this Court

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problem differently than the Fourth Circuit."); Young v. Kenley, 485 F.Supp. 365, 366-70 (E.D.Va. 1980) (comparing and contrasting the Fourth Circuit's Bonnes test with the First Circuit's Nadeau test), reversed, 641 F.2d 192 (4th Cir. 1981), cert. denied, 455 U.S. 961 (1982); Gillespie v. Brewer, 602 F.Supp. 218, 224 (N.D.W.Va. 1985) (noting difference between Bonnes standard and Nadeau standard).

reviewed in some detail the legislative history and purpose of the Attorney's Fees Act. As that review makes clear, Congress intended that fees should be awarded to those whose actions enforce the civil rights laws.[3] Most certainly, that purpose is not served by the fee award in this case.

On the merits, the square holding in Reigh I was that plaintiffs were not victims of civil rights violations; therefore, they did not enforce the civil rights laws. Thus, to hold that plaintiffs who lost are prevailing parties entitled to fees distorts both the plain language and the manifest intent of the Attorney's Fees Act. See

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[3] See id. at 2695 ("Congress enacted §1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process."); id. at 2696 ("Congress enacted §1988 specifically to enable plaintiffs to enforce the civil rights laws. . . ."") (emphases added).

Hewitt v. Helms, 107 S.Ct. 2672, 2675 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief before he can be said to prevail."). [4]

Here, however, because fees were awarded against a State, [5] the error goes even deeper. States are, of course, entitled to Eleventh Amendment immunity in federal court. Pennhurst State School and Hospital v. Haldeman, 465 U.S. 89 (1984). While that

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[4] In Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978), this Court held that before a "prevailing defendant" would be awarded attorney's fees, he would have to show that plaintiff's action was frivolous. Consistent with that approach, the plaintiff should be required to "win" - or at least not, as here, "lose" - before he is entitled to fees.

[5] Plaintiffs' complaint sought declaratory and injunctive relief against three defendants, all of whom were sued in their respective official capacities as clerks of Maryland trial courts. See Petition for Certiorari at 23 n.15. Unquestionably, therefore, this is an action against the State of Maryland. Hutto v. Finney, 437 U.S. 678, 700 (1978).

immunity was overridden by the Attorney's Fees Act, Hutto v. Finney, 437 U.S. 678 (1978), the predicate for overriding the State's immunity to attorney's fees orders is a state law, policy, or action that violates federal law. In Reigh I, the Fourth Circuit held that the State's rules did not violate federal law.

This case raises fundamental questions of legislative intent. Those questions include (1) whether Congress intended to authorize the award of attorneys' fees in a case where the district court's decision granting relief to plaintiffs was reversed in its entirety and final judgment was entered dismissing plaintiffs' complaint with prejudice, and (2) whether Congress intended to override the State's Eleventh Amendment immunity and subject it to a federal court

order imposing attorneys' fees in a case which the State won. These questions are of sufficient importance to warrant review of this case.

III. Because The Attorney's Fees Act Plays A Central Role In Much Of The Major Litigation In Which Amici And All States Are Involved, This Court Should Grant Review To Clarify The Standard To Be Applied In Determining Whether A Plaintiff Is Entitled To Fees.

In literally every case in which amici or one of their officials are sued for an alleged violation of one of the statutes enumerated in the Attorney's Fees Act,[6] potential liability for plaintiff's counsel's fees becomes a major litigation consideration. By virtue of the holding below, amici are confronted with the rather extraordinary prospect of paying fees even in cases where

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[6] The statutes enumerated in the Fees Act which may give rise to an award of attorney's fees are 42 U.S.C. §§1981, 1982, 1983, 1985, 1986, title IX of Public Law 92-318, and title VI of the 1964 Civil Rights Act.

their laws and policies are found not to have violated any of the statutes enumerated in the Fees Act. This rule will have a substantial adverse fiscal impact on amici and it places them at a truly unfair litigation disadvantage.

Because the Fourth Circuit's rule in this case is that prevailing does not, as a matter of law, assure that States will not be liable for plaintiff's attorney's fees, States must consider seriously the settlement of cases even if their best judgment is that their legal position will prevail. This Court should decide whether Congress intended this result.

CONCLUSION

For the reasons stated herein and in the petition, amici respectfully urge this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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